

EXHIBIT 3

1 IN THE UNITED STATES DISTRICT COURT
 2 IN AND FOR THE DISTRICT OF DELAWARE
 3
 4 APPLE INC.,)
 5 -----Plaintiff,)
 6 vs.) Case No.
 7 MASIMO CORP, et al.,) 22-CV-1377-MN-
 8 -----Defendants.)) JLH
 9
 10 TRANSCRIPT OF MOTION HEARING
 11
 12 MOTION HEARING had before the Honorable
 13 Jennifer L. Hall, U.S.M.J., in Courtroom 2B on
 14 the 15th of June, 2023.
 15
 16 APPEARANCES
 17 POTTER ANDERSON & CORROON LLP
 18 BY: DAVID MOORE, ESQ.
 19 BINDU PALAPURA, ESQ.
 20 -and-
 21 DESMARAIIS LLP
 22 BY: KERRI-ANN LIMBECK, ESQ.
 23 JORDAN MALZ, ESQ.
 24 JAMIE KRINGSTEIN, ESQ.
 25 -and-
 26 WILMERHALE
 27 BY: JENNIFER MILICI, ESQ.
 28 MARK FORD, ESQ.
 29
 30 Counsel for Plaintiff

1 THE COURT: So we're here today to
 2 hear motions in two cases. One is *Apple versus*
 3 *Masimo and Sound United*, and that's
 4 22-CV-1377-JLH. And the other is also *Apple*
 5 *versus Masimo and Sound United*. That's
 6 22-1378.

7 Let's have appearances starting with
 8 Plaintiff.

9 MR. MOORE: Good morning, Your Honor.
 10 David Moore from Potter Anderson on behalf of
 11 Apple. I'm joined by my partner Bindu
 12 Palapura. We're joined by our co-counsel from
 13 Desmarais Kerri-Ann Limbeck, Jordan Malz, and
 14 Jamie Kringstein. And from WilmerHale we're
 15 joined by Jennifer Milici and Mark Ford. And
 16 from Apple, Natalie Poe and Megan
 17 Thomas-Kennedy.

18 THE COURT: Hello. Good morning,
 19 everyone.

20 MR. PHILLIPS: Good morning, Your
 21 Honor. Jack Phillips of Phillips, McLaughlin,
 22 and Hall. With me in the courtroom are Steve
 23 Larson, Brian Horne, and Adam Powell from
 24 Knobbe Martens.

25 THE COURT: Good morning, everyone.

1 (Appearances continued.)

2 PHILLIPS MCLAUGHLIN & HALL P.A.
 3 BY: JOHN PHILLIPS, ESQ.

4 -and-

5 KNOBBE MARTENS
 6 BY: ADAM POWELL, ESQ.
 7 STEVE LARSON, EQ.
 8 BRIAN HORNE, ESQ.

9
 10 Counsel for Defendants

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 4 It's my understanding that we have four motions
 5 pending, but we're only going to hear two of
 6 them today. And we've given each side
 7 15 minutes.

10 These are Plaintiff's motions, actually,
 11 so we'll hear from Plaintiff first.

12 MS. LIMBECK: Good morning, Your
 13 Honor. Kerri-Ann Limbeck on behalf of Apple.
 14 I'll be addressing inequitable conduct and my
 15 co-counsel will address antitrust and false
 16 advertising.

17 Masimo asserts inequitable conduct in
 18 both of these cases not against any counsel
 19 that actually prosecuted the asserted patents.
 20 Instead, they assert it against a mishmash of
 21 Apple as a whole, its chief of IP, unnamed
 22 others at Apple, and in the Design case only --
 23 all 21 named inventors collectively. Those
 24 allegations cannot meet the heightened pleading
 25 standard under Rule 9(b).

26 So starting with Apple's chief IP
 27 counsel, Jeffrey Meyers, Masimo did not and
 28 cannot plead that he even had a duty of
 29 disclosure in either the utility patents or the
 30 design patents because they did not plead that

1 he's an inventor, that he's the attorney or
 2 agent that prosecuted or prepared the
 3 applications, or that he was substantively
 4 involved in prosecution. In the Utility case,
 10:06AM 5 its only allegation is that Mr. Meyers was an
 6 attorney of record for prosecution. Masimo
 7 pleads no facts and cites nothing in support of
 8 that bare allegation. In fact, it's false.
 9 Mr. Meyer's name doesn't appear in the
 10 prosecutions.

11 In the Design case, Masimo pleads even
 12 less. Its only conclusory allegation is that
 13 Mr. Meyers had a duty to disclose, but Masimo
 14 did not plead that he was substantively
 10:07AM 15 involved in prosecution to give rise to that
 16 duty.

17 So additionally, Masimo did not and
 18 cannot plausibly plead in either case that
 19 Mr. Meyers had the requisite knowledge and
 10:07AM 20 specific intent. In both cases, Masimo fails
 21 to allege any facts from this Court could
 22 reasonably infer that Mr. Meyers actually knew
 23 of any of the references that they identified
 24 as being allegedly withheld from the Patent
 10:07AM 25 Office, let alone that Mr. Meyers knew of the

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1 specific technical disclosures within those
 2 references and deliberately withheld them with
 3 specific intent to deceive the Patent Office.
 4 The only conduct that Masimo actually
 10:08AM 5 attributes to Mr. Meyers in its pleading is
 6 that Mr. Meyers and others at Apple hired
 7 different law firms to do different things, to
 8 prosecute design patents, utility patents, and
 9 handle IPRs. That is not sufficient to
 10 plausibly plead that Mr. Meyers deliberately
 11 compartmentalized these particular prosecutions
 12 with intent to deceive the Patent Office, and
 13 that's why Masimo cannot cite a single case in
 14 support of that entirely novel theory. So
 10:08AM 15 Masimo's allegations against Mr. Meyers fail
 16 for those reasons.

17 Now, in the Design case specifically,
 18 Masimo has this additional allegation that the
 19 entire group of all 21 design inventors
 10:08AM 20 collectively committed inequitable conduct.
 21 Those allegations fail too because Masimo
 22 doesn't even allege that a single named
 23 inventor knew of any of the references that it
 24 cites that were supposedly withheld during
 10:09AM 25 prosecution, let alone that every single

1 inventor knew of those references, knew of the
 2 specific disclosures within the references, and
 3 withheld them with an intent to deceive. The
 4 only allegation against the Design inventors
 5 specifically is that, on information and
 6 belief, they knew the claimed designs were
 7 functional and not ornamental as a result of
 8 the exposure to the development process.
 9 Basically, because they're inventors, they were
 10 exposed to the development; therefore, they
 11 must have known these patents were invalid for
 12 functionality.

13 THE COURT: Can I ask -- and I
 14 probably won't be able to articulate this very
 10:09AM 15 well, but maybe you'll catch my drift.

16 I understand that the Federal Circuit
 17 caselaw is very clear that you need to identify
 18 individuals that are substantively involved and
 19 you need to satisfy Rule 9(b). Arguably -- or
 10:10AM 20 maybe not arguably. It was clear it was doing
 21 that because it was trying to curb the amount
 22 of inequitable conduct claims that made it past
 23 the pleading stage.

24 But is there something inherently wrong
 10:10AM 25 with the idea of the inequitable conduct claim

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1 that they're trying to put forward, which is
 2 that if you've got a big company where there's
 3 somebody in charge, and we want to get both
 4 design patent claims and utility patent
 5 claims -- this is what they're saying. I get
 6 it you disagree -- on the same aspects of an
 7 invention and there's a person up there that
 8 says, okay, you guys are going to be the
 9 inventors on this one, and you guys are going
 10 to be the inventors on this one. The inventors
 11 might not really know anything about why
 12 they're listed on one or the other patent. Can
 13 that never be inequitable conduct, or is it
 14 just not inequitable conduct here for some
 10:11AM 15 reason?

16 MS. LIMBECK: It's not inequitable
 17 conduct here because as you mention, the
 18 Federal Circuit under the *Exergen* standard
 19 requires that you actually allege that there's
 10:11AM 20 some specific individual that knew -- that had
 21 a duty of disclosure in these prosecutions
 22 and actually knew of some invalidating
 23 reference that was withheld.

24 THE COURT: Let me just ask. You say
 10:11AM 25 it's not here, but it looks to me like you're

1 also saying it could also be inequitable
 2 conduct if the person in charge doesn't have a
 3 duty of disclosure under the PTO rules.

4 MS. LIMBECK: Yes, Your Honor, I
 5 think that's true because when you just are
 6 pleading -- it basically amounts to a pleading
 7 against Apple as a company as a whole, which is
 8 exactly what the Federal Circuit has said
 9 cannot meet the pleading standard. If you're
 10 just going to pick a name at the top of the
 11 legal department for Apple, that's basically
 12 the same thing as just accusing Apple in
 13 general without actually pleading any
 14 particular facts tying Mr. Meyers to these
 15 particular prosecutions and even saying that
 16 he's the one that hired these different law
 17 firms. Apple has thousands of prosecutions
 18 every year. Of course they have multiple law
 19 firms. That's standard practice. That's not
 20 inequitable conduct.

21 Unless you have any other questions, Your
 22 Honor.

23 THE COURT: No, that's it. Thank you
 24 very much.

10:12AM 25 MS. LIMBECK: Thank you.

1 don't you focus on that.

2 MS. MILICI: Your Honor, we agree
 3 that it does not state a Walker process claim.
 4 As my co-counsel just explained, the
 5 inequitable conduct allegations fail. But even
 6 if you look at antitrust injury -- and just in
 7 general, Masimo has failed to allege an
 8 antitrust injury and certainly hasn't put
 9 forward any other theories. It doesn't even
 10 try.

11 But as to its Walker process allegations,
 12 its argument appears to be that if Apple were
 13 to succeed on a fraudulently obtained patent,
 14 then at that point they would be excluded.

10:14AM 15 This is an impossibility. If Apple were to
 16 succeed in excluding Masimo, it would be
 17 because it asserted a valid patent that's
 18 uninfringed. There's no way the outcome of
 19 this litigation can be that Masimo is illegally
 20 included.

21 I want to factually distinguish this case
 22 from something like *TransWeb*. In *TransWeb*, you
 23 had a plaintiff who alleged that because it was
 24 unable to meet the costs of litigation, it had
 10:14AM 25 to sell part of its business at a fire sale

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1 MS. MILICI: Good morning, Your
 2 Honor. Jennifer Milici from WilmerHale.
 3 Your Honor, as we explained in our brief,
 4 Masimo's antitrust claims fail at every turn.
 5 Masimo's counterclaims are a mishmash of
 6 conflicting allegations that Apple stole the
 7 intellectual property of Masimo and others,
 8 sought confidential information from App Store
 9 Developers, and yet then flooded the market
 10 with somehow inferior products that somehow
 11 hurts the health watch market.

12 Taking the actual allegations as true for
 13 the purpose of the motion, these allegations
 14 cannot add up to an antitrust violation. We've
 10:13AM 15 listed three independent grounds on which the
 16 claim should be dismissed. I'm happy to start
 17 wherever you like or answer questions.

18 THE COURT: Well, agree with you that
 19 there's a kitchen sink. But that's not
 10:13AM 20 surprising, given that courts look very
 21 carefully at antitrust allegations, and you
 22 want to get in everything you can get and don't
 23 want it to be dismissed.

24 What about the Walker process? You
 10:13AM 25 agree it doesn't say the Walker process. Why

1 price. It lost customers. You saw in that
 2 case that a jury awarded lost profits from an
 3 injury that happened because of the pendency of
 4 the litigation itself. The Court did talk
 5 about whether attorney's fees can be antitrust
 6 damages, but it did so in the context of the
 7 case where antitrust injury and liability had
 8 been established and were not contested. Those
 9 were not contested on appeal.

10 If we look at Masimo's allegations here,
 11 not only do they fail to allege that the cost
 12 of litigation is going to somehow impair their
 13 ability to compete, they allege the opposite.
 14 In paragraph 21 of their complaint, they
 10:15AM 15 affirmatively allege that they have the
 16 resources to litigate this case, so this is
 17 nothing like the situation in *TransWeb* where
 18 the litigation itself is going to cause harm.

19 THE COURT: Let me make sure I
 20 understand. Your view is -- let me ask it this
 21 way. You're seeking an injunction; right?
 22 MS. MILICI: Yes Your Honor.

23 THE COURT: So if you won, they would
 24 be enjoined; right?
 10:15AM 25 MS. MILICI: Yes, Your Honor.

1 THE COURT: We're going to take this
 2 real slow because it's still early for me and
 3 the caffeine hasn't kicked in yet. So their
 4 choice is either be enjoined from selling or
 10:16AM 5 defend the litigation; right?

6 MS. MILICI: Your Honor, I understand
 7 that that's how *TransWeb* set it up. I do want
 8 to point out that they are not challenging all
 9 of the patents that are being asserted by Apple
 10 in this case, and that's just another
 11 distinguishing feature.

12 THE COURT: Got it. Okay. I
 13 understand.

14 MS. MILICI: So -- and, Your Honor, I
 10:16AM 15 think that this came up in another case before
 16 Your Honor, the *NRT* case. And again, we see
 17 the distinguishing features there in a case
 18 like *NRT* or *Bard* that they cite. You have a
 19 plaintiff that was alleging that the litigation
 10:16AM 20 itself caused harm to competition, not just if
 21 the plaintiff had been successful in asserting
 22 a fraudulently obtained patent.

23 I would also say that if you read
 24 *TransWeb* in the way that Masimo suggests, I
 10:17AM 25 think it runs directly into Third Circuit

1 channel. They're really alleging injury to
 2 itself as a business, which there's plenty of
 3 caselaw that says that's not sufficient. Even
 4 a plaintiff that's been harmed has to allege a
 5 wider impact of the allegation, and the other
 6 claims in the complaint other are conclusory.

7 THE COURT: Understood.

8 MS. MILICI: I'm happy to talk about
 9 the anticompetitive conduct on this.

10 THE COURT: Why don't you hit those.
 11 We talked about the Walker process where the
 12 conduct is sued.

13 MS. MILICI: We talked about the
 14 Walker process. In addition, Masimo alleges
 10:18AM 15 that Apple infringes intellectual property. We
 16 cited caselaw from across the country showing
 17 that infringement of intellectual property
 18 cannot be a basis for an antitrust claim. If
 19 you look at cases like *Philadelphia Taxi* which
 10:19AM 20 wasn't dealing with intellectual property, but
 21 it really states the proposition clearly that
 22 conduct that brings more competitors to market
 23 can't be exclusionary conduct. In that case,
 24 it was even people who entered the market
 10:19AM 25 illegally through illegal conduct. That's

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1 precedent. You see the Third Circuit in cases
 2 like *Host International*/which says that
 3 speculative harms are not sufficient to state
 4 an antitrust injury. It can't be a speculative
 5 harm, can't be a potential harm. You have to
 6 show facts that show actual injury.

7 And the injury Masimo is complaining of
 8 is not just speculative. It's impossible.
 9 There's no way that Apple can succeed on a
 10:17AM 10 preliminary injunction if the patents were
 11 actually fraudulently obtained because they are
 12 able to raise that defense in this case.

13 THE COURT: I need to make a note.
 14 Hold on one sec.

15 Okay. Go ahead.

16 MS. MILICI: Thank you, Your Honor.

17 And to be clear, as far as antitrust
 18 injury goes, that's the only argument that they
 19 make. They do not make any -- have any factual
 10:18AM 20 allegations supporting an antitrust injury from
 21 any of the other conduct that they allege.
 22 They are not alleging that there's some portion
 23 of the market that's been -- that they're
 24 foreclosed from. It's not like a location
 10:18AM 25 where they say they have access to some retail

1 still pro competitive. It brings competitors
 2 to the market. It can't be a basis for the
 3 antitrust claim.

4 Moving on to the allegations, Masimo
 5 alleges that there's a monopoly leveraging. As
 6 Your Honor stated in *Simon and Simon*, monopoly
 7 leveraging is not a standalone claim. You need
 8 to allege unlawful conduct, and Masimo hasn't
 9 done that. In its opposition brief, it
 10:19AM 10 references seeking confidential information as
 11 if that's an unlawful act. Of course, Apple,
 12 like everybody else, has the right to choose
 13 who they will deal with and on what terms, and
 14 Masimo points to no caselaw saying that
 10:20AM 15 somebody is unable to ask for information.

16 I think if you look really closely at the
 17 actual paragraphs in the complaint on this,
 18 they don't ever allege that they gave any
 19 confidential information to Apple or that Apple
 10:20AM 20 did anything with that confidential
 21 information. It's just this kind of
 22 theoretical proposition that they could have
 23 given information to Apple or somebody else
 24 might have and Apple might have misused that,
 10:20AM 25 but that's not in his complaint.

1 In addition, either, the harm they're
 2 conclusorily asserting from that is that
 3 somehow it might stop somebody from wanting to
 4 invest or innovate, but they don't allege
 10:20AM 5 anything Apple did caused them to stop
 6 investing. In fact, they alleged exactly the
 7 opposite, that they're investing like
 8 gangbusters and ready to go. So they pled
 9 themselves out of court on each of these
 10 issues.

11 Finally, on false advertising, courts
 12 apply a very high standard to antitrust claims
 13 based on false advertising. Otherwise, the
 14 courts would be chock full of people
 10:21AM 15 complaining that its competitors -- that they
 16 don't like their competitors' ads and they're
 17 entitled to treble damages. And they don't
 18 come close to meeting the standard for an
 19 antitrust claim based on false advertising.
 20 Again, for the same reasons. They are not
 21 alleging they were foreclosed from the market
 22 as a result of it. They're not alleging
 23 they're unable to compete. They're not
 24 alleging they're unable to contradict those
 10:21AM 25 statements. If anything, the allegations shows

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1 they're plenty able to fund studies that they
 2 claim disprove Apple's advertising and put it
 3 out in the world. For both antitrust injury
 4 and antitrust conduct, these are separate bases
 5 on which the claims should be assessed.

6 I'm happy to move on to the market
 7 definition or move on to false advertising
 8 and --

9 THE COURT: Why don't you move on to
 10 false advertising.

11 MS. MILICI: Thank you, Your Honor.
 12 So for the false advertising claim,
 13 there's, again, like, a fundamental mismatch
 14 between what they're saying Apple said is false
 10:22AM 15 and why they say it's false. So there's a
 16 mismatch between the facts that they say the
 17 statements are false and the statements
 18 themselves, and I can talk about that in a
 19 second.

20 In addition, they have again failed to
 21 allege any proximate cause between what's the
 22 injury to Masimo from these ads and what are
 23 the steps in between. Just to illustrate that
 24 point, if you look at their allegations about
 25 what it is Apple said and you look at it on the

1 blood oxygen feature, they have three
 2 paragraphs in their counterclaims that describe
 3 a 2020 launch, and there's a video of that
 4 launch. That video is available on YouTube.
 10:22AM 5 They also allege that there have been articles
 6 that came out since then that they say the
 7 blood oxygen feature doesn't work unless you
 8 use it right. That's what those articles say.
 9 Even if you were to take the articles to
 10 mean what Masimo says they do, their product
 11 didn't come out until the end of 2022. I think
 12 their theory is that people who were looking
 13 for the blood oxygen monitors at the end of
 14 2022 are going to go to YouTube, pull up the
 10:23AM 15 video, watch the first 15 minutes of it in
 16 which there's general discussion about blood
 17 oxygen monitoring, and no statements made --
 18 but then they're going to take a misimpression
 19 from that about Apple and then not read
 10:23AM 20 anything else and then not buy the W1 instead.
 21 And I think they have not alleged those
 22 chains, the steps of the chain of causation,
 23 which as we see in the case, like *Lexmark*, but
 24 also *Mispreno*, you need to allege in order to
 10:23AM 25 plead a false advertising claim. Just saying

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1 they said this thing years ago and I lost
 2 sales, it's not enough. There has to be some
 3 plausible allegation of the steps in the
 4 causation there.

5 When we look at the particular
 6 statements, I just rewatched that video this
 7 morning. It does not say what Masimo claims
 8 its study proves is false. It's statements
 9 about the Apple watch generally, statements
 10 about what blood oxygen is, what blood oxygen
 11 measurements are used for, and statements that
 12 you can measure your blood oxygen with the
 13 Apple watch. There's no statement in that
 14 video or any of the other ads that they are
 10:24AM 15 citing that says that this is -- that this is
 16 the same. It's suitable to replace a
 17 hospital-grade monitor. That's just not in
 18 these statements.

19 And I think when you look at that, it's
 20 clear that there's just a mismatch between what
 21 they're doing -- and I'm going to leave aside,
 22 of course, we have very serious criticisms of
 23 the study that Masimo did -- and -- but we'll
 24 stay in the four corners of the complaint for
 25 this argument.

1 I would say the same thing on the IRN
 2 features where, again, the statements that
 3 they're referring to in their counterclaims say
 4 that the Apple Watch will check for irregular
 10:25AM 5 rhythms and irregular rhythms may be suggestive
 6 of A-fib. That's the statement.

7 And then they cite to a Mayo Clinic study
 8 that said not everybody who mentioned the Apple
 9 Watch when they presented to the ER had a
 10 clinically actionable diagnosis when they leave
 11 there. I think when you read the study,
 12 limitations of the study, that suggests it
 13 can't be read the way Masimo wants to. Even if
 14 you were to accept their representation of it,
 15 there's no statement where Apple ever said if
 16 you get this notice, it means that when you get
 17 to the ER that you will at that point have a
 18 diagnosis that's going to be caught. Again,
 19 it's a mismatch between what they say are false
 10:26AM 20 statements and the facts that they say prove
 21 that they are false.

22 So, Your Honor, I'm happy to answer any
 23 questions on any of these things.

24 THE COURT: No, that was very
 10:26AM 25 helpful. Thank you very much. I appreciate

1 it.

2 MS. MILICI: Thank you.

3 THE COURT: Let's hear from the other
 4 side. We gave Apple a little extra time.
 10:26AM 5 You're welcome to have the extra time as well
 6 if you need it.

7 MR. POWELL: Thank you. My name is
 8 Adam Powell for counter-claimant Masimo, and
 9 I'll start with the inequitable conduct claims.

10 And I want to start where counsel
 11 started, which is this idea of who conducted or
 12 who was responsible for the inequitable
 13 conduct. There's a lot of discussion of a
 14 mishmash, where we have supposedly some
 10:26AM 15 allegations that are unclear as to whether
 16 they're directed at Mr. Meyers or the named
 17 inventors or Apple as a whole, and I think
 18 that's wrong.

19 If you look as to each individual person,
 10:27AM 20 I'll give you some examples, is that Mr. Meyers
 21 is one of the individuals responsible for,
 22 again, like you said, selecting which firm is
 23 responsible for each aspect. And Masimo has
 24 alleged that Mr. Meyers withheld information
 10:27AM 25 and concealed information, took affirmative

1 steps to prevent the disclosure of material
 2 information to the Patent Office.

3 Now, we have separately alleged that
 4 Apple did not disclose the information to the
 5 Patent Office. Those allegations about Apple
 6 as a whole are really important for the --
 7 but -- for materiality because if Mr. Meyers
 8 concealed the information but someone else
 9 disclosed it, Apple may say it's not material.
 10 That's why we say nobody disclosed it from
 11 Apple and then we say Mr. Meyers specifically
 12 concealed it and he intended to deceive the
 13 Patent Office.

14 The same is true for the named design
 10:28AM 15 inventors. The allegation isn't directed to
 16 them collectively. We used a defined term to
 17 save space. It could have been separate
 18 paragraphs for each individual person. The
 19 idea also isn't that these named design
 10:28AM 20 inventors, just by virtue of the fact they
 21 developed the material, they must know it's
 22 functional. That's not the allegation. The
 23 allegation is they worked with the engineers
 24 who do know the functional aspect of the
 10:28AM 25 design. They were aware of the functional

1 aspect because of the way they worked with the
 2 engineers that developed the functional aspect.
 3 Again, that --

4 I just don't think there's any mishmash.
 10:28AM 5 The complaint is very specific and deliberate
 6 as to who did each thing, and if you look at
 7 Meyers alone, we pleaded everything we need to
 8 plead, that he had knowledge of this functional
 9 aspect, that he had knowledge of the withheld
 10 art, and that he deliberately concealed that
 11 information from the Patent Office.

12 Now, Apple also argues that this is a
 13 novel theory, that the idea of selecting two
 14 different law firms, one law firm to prosecute
 10:29AM 15 design patents, a different one to prosecute
 16 utility patents, a third one to assert some of
 17 those same patents against Masimo in IPRs
 18 they're saying is a novel theory, and nothing
 19 supports that. They've not cited any caselaw
 10:29AM 20 dismissing the allegation from a complaint.

21 And I think that's what's important here,
 22 is that the Patent Office is specific that you
 23 don't have to allege someone actually signed a
 24 paper and submitted it to the Patent Office.
 10:29AM 25 The allegation is that the person has to be

1 substantively involved in the prosecution, and
 2 one way you can be substantively involved is
 3 deliberately picking who to prosecute the
 4 patents so that you can keep information away
 10:30AM 5 from the Patent Office.

6 And as Your Honor pointed out, it's sort
 7 of fundamentally unfair to say, well, he
 8 deliberately chose different people to
 9 prosecute these applications, and he did so for
 10:30AM 10 the specific purpose of withholding it from the
 11 Patent Office so that Apple could obtain
 12 patents that he knew were invalid and then to
 13 say he didn't actually sign the paper itself so
 14 therefore you're off the hook. There's no
 10:30AM 15 caselaw that supports that. It's not supported
 16 by the regulations that state who has a duty to
 17 disclose. And the allegation that, hey, this
 18 is commonplace and Apple does it all the time,
 19 look, that may or may not be true. That is a
 10:30AM 20 factual dispute, though. It can't be resolved
 21 in the pleadings.

22 Our allegations are very specific. They
 23 must be accepted as true and all inferences
 24 have to be in our favor at this stage, and we
 10:31AM 25 can see what discovery will yield and whether

1 that stated that "this customer number listing
 2 for a Reese includes all practitioners in the
 3 firm who are licensed to practice before the
 4 USPTO but in no way indicates any role or
 5 responsibility for prosecution on behalf of
 6 that client." It was a specific factual
 7 allegation made by one of the parties in that
 8 case. It was not Court holding that a customer
 9 number in no way indicates role in prosecution.

10:32AM 10 I'll move on briefly to the false
 11 advertising. My colleague will be addressing
 12 the antitrust allegations include those
 13 allegations that they relate to false
 14 advertising, but on the merits of the false
 10:32AM 15 advertising claim, we also have this argument
 16 that there's a mismatch between the facts and
 17 the proximate cause and what actually happened
 18 here and what the allegation -- or what the
 19 video says.

10:33AM 20 Counsel indicated that they reviewed the
 21 video and it doesn't actually support an
 22 argument that Apple is advertising blood oxygen
 23 as clinically acceptable. The issue there is
 24 our complaint is very specific that -- and I'll
 10:33AM 25 quote it. This is paragraph 143 states that

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1 we can ultimately prove our claims of
 2 Mr. Meyers' intent.
 3 So I also wanted to talk about this idea
 4 that Mr. Meyers, they said, is false. His name
 10:31AM 5 never appears in the prosecution history. This
 6 was in our opposition. His name is on the
 7 customer list; right? That's the issue is,
 8 there's a -- I'm sorry. Not customer list. A
 9 customer number; right? That's the customer
 10:31AM 10 number of everybody that has power of attorney
 11 in that particular application, and we dealt
 12 with that in our opposition.

13 And Apple responded with this case in
 14 their reply, *Digital Ally*, and they said that
 10:31AM 15 *Digital Ally* held a customer number in no way
 16 indicates any role or responsibility in
 17 prosecution. That's incorrect.

18 If you look at this *Digital Ally* case,
 19 there's a couple problems with it. Number one,
 10:31AM 20 it was not addressing inequitable conduct or
 21 the standards at the pleading stage. What it
 22 was addressing is whether a prosecution bar
 23 should apply far and wide. And Apple didn't
 24 quote the holding of the case. They quoted a
 10:32AM 25 declaration from the plaintiff in that case

1 "Apple falsely and continually associates the
 2 Apple Watch's pulse oximetry feature with
 3 medical use and reliable measurements." We
 4 then go on to have six paragraphs explaining
 5 and quoting from all of the different
 6 advertisements. It's --

7 The argument is, well, we never actually
 8 said it's clinically acceptable. No, what you
 9 did is you had a whole bunch of advertisements
 10:34AM 10 that created that impression to the consumer,
 11 and that's a false and misleading impression
 12 because even Apple is not arguing that its
 13 blood oxygen is actually accurate. The reality
 14 is the studies and various different
 10:34AM 15 third-party --

16 (Loud noise in the courtroom.)
 17 THE COURT: Is everyone all right?
 18 MR. PHILLIPS: Knocking them over.
 19 MR. POWELL: What's in the complaint
 20 is we have studies referenced, we have
 21 statements from third parties all indicating
 22 that the blood oxygen feature is not reliable.
 23 And in fact, some of those third parties came
 24 out and said, look, Apple is misleading
 10:34AM 25 consumers. We have that in our complaint where

1 the third parties say Apple is convincing
 2 customers to use this in a way that's
 3 inappropriate, and they have this sort of
 4 fine-print disclaimer and they think that
 10:34AM 5 immunizes them. But the reality is people are
 6 going to use this thing for medical purposes
 7 when they have no justification for doing so.

8 Again, this is all pleaded in the
 9 complaint beginning at paragraph 143. The
 10 allegations are very specific. And really all
 11 I'm hearing from counsel is disagreeing about
 12 the facts, and those facts, again, that's a
 13 question for another day. At this point, they
 14 need to be accepted as true.

10:35AM 15 And just very briefly on IRN, the
 16 irregular rhythm notification. This is the
 17 same argument, is that, well, customer, Apple
 18 says it may be indicative of a problem. The
 19 reality is 90 percent of people that went to
 10:35AM 20 the hospital didn't have any new actionable
 21 issue. Now, Apple says it's actually
 22 60 percent of them because some of them had an
 23 existing problem; right? Well, you've still
 24 got 40 percent false positive. About half of
 10:35AM 25 the people that appear in the hospital don't

1 Steven Larson for counter-claimant Masimo
 2 before the Court. I'll address the antitrust
 3 issues. I didn't hear argument about the
 4 market power and definitions. I'll skip those
 5 unless the Court has any questions.

6 THE COURT: No questions.

7 MR. LARSON: I'll start where counsel
 8 started with Walker process, and counsel argued
 9 that our theory runs squarely into the Third
 10 Circuit precedent. The *TransWeb* is the Federal
 11 Circuit's leading Walker process case. It was
 12 an appeal from the District of Delaware
 13 applying Third Circuit precedent. We also
 14 cited the *Garden* case which a District of
 10:37AM 15 Delaware case that denied summary judgment of
 16 Walker process claims where the only allegation
 17 of injury was attorney's fees and also there
 18 was lost opportunities that were investment
 19 opportunities that were alleged. That was all.

10:37AM 20 In this case, we allege, certainly,
 21 attorney's fees. We also allege lost
 22 opportunities, lost investments or lost
 23 business opportunities, harm to our business
 24 reputation. And we explain, similar to what

10:38AM 25 *TransWeb* calls for, why Apple's conduct,

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1 need help, and that's the problem, is Apple is
 2 advertising the Apple watch as getting you help
 3 when you need it. That's the quote. "When you
 4 need it." About half of the people at least,
 5 even reading the article the way Apple wants to
 6 read it, which would be improper at this stage,
 7 about half of the people don't need help.

8 So the reality is, again, we have very
 9 specific allegations. This is a factual
 10 dispute on the false advertising material. The
 11 allegations need to be accepted and taken all
 12 inferences in our favor at this point.

13 So the only thing I'll add is, of course,
 14 if there's some reason, some deficiency, of
 15 course, there's more allegations that could be
 16 added if we needed to amend, and I don't think
 17 Apple is seriously asking for dismissal with
 18 prejudice. It was mentioned one time in a
 19 conclusion, so there's really no support or
 10:36AM 20 argument for that.

21 With that, unless you have any further
 22 questions.

23 THE COURT: No, thank you.
 24 MR. POWELL: Thank you.
 10:36AM 25 MR. LARSON: Good morning, Your Honor

1 Apple's assertion of fraudulent patents, if
 2 successful, would harm competition. You saw in
 3 *TransWeb* a really beautiful explanation on why
 4 you focus on the harm to competition that would
 5 result in the scheme is successful. The
 6 Federal Circuit explained the focus is on the
 7 competition reducing act is filing a lawsuit
 8 asserting fraudulent acts.

9 In its reply, Apple pointed to the *Otsuka*
 10 case to argue what the Federal Circuit said
 11 attorney's fees are not antitrust injuries,
 12 that was really not what it meant. It was
 13 really just talking about damages, not
 14 antitrust injury, and the *Otsuka* case is a
 10:38AM 15 decision from the District of New Jersey. But
 16 this Court, in *Azurity*-- that's 2023 Westlaw
 17 157732 -- rejected that interpretation from the
 18 *Otsuka* case and said no, the *TransWeb* case
 19 means what it says. Attorney's fees spent in
 10:39AM 20 response to a lawsuit asserting fraudulent
 21 patents are antitrust injury.

22 THE COURT: What's the case you just
 23 mentioned?

24 MR. LARSON: *Azurity*. It's 2023
 10:39AM 25 Westlaw 15732. So that's three Delaware cases

1 supporting our view of *TransWeb* and how it
 2 should apply here.

3 Our allegations are very similar. We
 4 explain in our complaint that what Apple is
 5 trying to do here, again, they're pretty open
 6 about it. They filed this lawsuit, and they
 7 sought expedited discovery because they might
 8 seek a preliminary injunction. They sought to
 9 expedite the schedule because of potential harm
 10 they think will result to the market shares and
 11 our product competing. They alleged in the
 12 complaint that -- eventually what they argued
 13 is our product is so powerful that it could
 14 reach potentially 100 percent of the market.

10:39AM 15 And this is exactly what a Walker process
 16 case is about, a party that asserts fraudulent
 17 patents to stop competitors who actually have
 18 the possibility of opening up competition,
 19 displacing their market position, displacing
 10:40AM 20 their monopoly power. So I think we clearly
 21 have an antitrust injury for the Walker
 22 process. That's straightforward. If we manage
 23 this injury of Walker process, we have standing
 24 for all the theories.

10:40AM 25 Apple said we don't explain our antitrust

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1 injuries for the other theories. That's not
 2 true. In our brief, we pointed to paragraphs
 3 where we explained why those other theories
 4 aren't competition. There wasn't much argument
 10:40AM 5 about that in the brief, but I can go into more
 6 detail on those.

7 If you have antitrust injury on on
 8 theory, at that point you need to look at the
 9 overall anti-competitive scheme, which we do.
 10:40AM 10 And Apple argues you can't add lawful conduct
 11 and lawful conduct to come up with an
 12 anticompetitive scheme, but clearly asserting a
 13 fraudulent patent is anti-competitive, and if
 14 that is accepted, then you look at the overall
 15 scheme.

16 I'll move on now to predatory
 17 infringement and, essentially, the arguments in
 18 the briefs was essentially there should be a
 19 bright-line rule that patent infringement can
 10:41AM 20 never be anticompetitive, and we show there is
 21 no bright-line rule like that for the Federal
 22 Circuit, and that makes a lot of the sense.
 23 And we cited the *Styles* case that said, well,
 24 it was part of an overall scheme of conduct in
 25 that case. The Court allows the allegations to

1 go forward, including allegations of
 2 intellectual property theft, and that was in
 3 California.

4 And we think it really makes sense here,
 5 and we explain in great detail in our complaint
 6 that Apple has a practice. Apple calls it
 7 efficient infringement. We would call it
 8 predatory infringement, which is Apple
 9 identifies a market, identifies a technology
 10 leader, purports to meet with the technology
 11 leader, but ends up taking their technology and
 12 eventually displaces the technology leader and
 13 does so through, first of all, imperfect theft.
 14 In other words, instead of lawfully working
 10:41AM 15 with the technology leader, takes the
 16 technology in a way that implements it
 17 imperfectly, which spoils the market, which
 18 harms the market. If Masimo is coming out with
 19 its watch now without Apple already being out
 10:42AM 20 there with a pulse oximetry feature that
 21 doesn't work well, I think the market would be
 22 in a much better position to receive our
 23 product. And instead what you see is a
 24 combination of conduct of Apple pulling out all
 10:42AM 25 the stops, essentially, to try to stop us in

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1 our tracks, stop the new product that Apple
 2 recognizes is so powerful that it might
 3 substantially erode Apple's market share.

4 It does that through, first of all,
 5 taking our technology and imperfectly
 6 implementing it which spoils the market,
 7 engaging in false advertisement which hides the
 8 fact of the flaws in its own technology, which
 9 is even worse because once consumers experience
 10:42AM 10 that -- they expect Apple -- if anybody is
 11 going to have a product that works well, it's
 12 going to be Apple. They see pulse oximetry
 13 doesn't work well, and that harms the market,
 14 hurts us.

10:42AM 15 Also, as we're about to launch our
 16 product, Apple exploits its power over IOS apps
 17 to prevent our competing health app from being
 18 able to be approved and does it through
 19 affirmative conduct, not just failure to deal,

10:43AM 20 lack of deal, does it through, essentially,
 21 trying to acquire confidential information
 22 under false pretenses, is our allegation. And
 23 in that case, we cited the *Ally* court case
 24 where the court denied a motion to dismiss
 10:43AM 25 where the allegation was Apple was using its

1 power over IOS apps to harm the competing app,
 2 to prevent that competing app --
 3 In our case, not only do they harm our
 4 competing app, but they harmed our actual
 10:43AM 5 competing product in the nascent health watch
 6 market just as it was being where released,
 7 basically making it a worse product. It is not
 8 something that's just happened to Masimo. It
 9 happened to many companies. It happened to
 10:43AM 10 Alive Core. This harm to composition is not
 11 just harm to us, and I think if you look at the
 12 overall scheme, it would make sense that we
 13 would allege all these allegations as Apple
 14 pulling all the stops out to try to stop us in
 10:44AM 15 our tracks to try to stop us from releaseing
 16 our product.
 17 Going to monopoly leveraging, as we said,
 18 we allege affirmative misconduct. It's not
 19 simply a lack of a duty to deal. We point out
 10:44AM 20 that Apple uses the developer agreement,
 21 section 9.23, where Apple says we can use
 22 whatever confidential information you give us
 23 for any purpose and uses its power over IOS
 24 apps to try to obtain confidential information
 10:44AM 25 through that process. And again, it's not just

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1 harm to Masimo. Apple has done this to other
 2 companies, including Alive Core.
 3 False advertising, as I mentioned, this
 4 is part of the overall scheme where Apple tries
 10:44AM 5 to hide the fraud in the imperfectly acquired
 6 technology. Apple again -- the pattern here is
 7 you don't really see them squarely addressing
 8 our allegations, at least in the briefing. To
 9 show whether or not plausible, Apple argues
 10:44AM 10 bright-line rules. They say you have to show
 11 that it's clearly false, but we cited caselaw
 12 including the pages -- including the pages that
 13 explains it doesn't have to be clearly false.
 14 It could be false or misleading. It doesn't
 10:45AM 15 have to be knowing.
 16 And Apple also argues, well, you have to
 17 show that you couldn't correct the false
 18 advertising, but Apple cites cases where for,
 19 example, the defendant sends a mailer to
 10:45AM 20 hospitals that had some statements that were
 21 arguably not true, and the Court said, well,
 22 the plaintiff could easily send the same mailer
 23 and correct those statements. In our case, you
 24 have Apple, largest company in the world,
 10:45AM 25 basically a household name. I read a report

1 that it spent probably \$12 billion in
 2 advertising in 2020, which is probably more
 3 than Masimo's revenue, and the idea that
 4 Masimo, which is still relatively unknown in
 10:45AM 5 the consumer market, is going to put out an
 6 advertising campaign that undoes the harm in
 7 the public when it perceives Apple as a company
 8 that's always going to have the best products,
 9 the harm from that false advertising just
 10 doesn't make a lot of sense.
 11 In fact, in our complaint, we point out
 12 there's an article in the *Washington Post* and
 13 *Verge* that point out the flaws in Apple's
 14 technology but that hasn't corrected the
 10:46AM 15 problem.
 16 We think to the extent the allegations
 17 are required on that, we can provide it, but we
 18 think what we have a sufficient, and the pages
 19 confirm false advertising. Our allegations are
 10:46AM 20 plausible, and I think they should go foward.
 21 I just make a brief note on fair
 22 competition, which is that we point out that
 23 even if the conduct that's pointed to doesn't
 24 rise to the level of violating the Sherman Act,
 10:46AM 25 it would still be an incipient violation under

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1 California's unfair competition law, and we
 2 pointed to the *Epic* case from the Northern
 3 District of California. I want to point out
 4 since then the Ninth Circuit affirmed that case
 10:46AM 5 and affirmed that under California law, even if
 6 conduct doesn't quite rise to the level of
 7 violating the Sherman Act, there can still be
 8 an incipient violation. And of course, we
 9 think we more than satisfy showing that Apple
 10:47AM 10 violated the Sherman Act.
 11 If you think about it, incipient
 12 violation, when you have a company like Masimo
 13 on the cusp of providing that product, this
 14 amazing product that would actually displace
 10:47AM 15 Apple's dominant position, open up the market,
 16 bring competition, reduce prices, provide more
 17 choices, and Apple engages in all this conduct
 18 to stop us in our tracks, we certainly think
 19 that shows at least an incipient violation.
 10:47AM 20 Unless Your Honor has questions, I think
 21 that's all.
 22 THE COURT: Very good. Thank you
 23 very much. We'll just give you a couple
 24 minutes to make a reply.
 10:47AM 25 MS. MILICI: Thank you. I appreciate

1 the opportunity. There are a couple things
 2 that counsel said that I really want to respond
 3 to.

4 One is this idea that if they make it a
 10:48AM 5 Walker process claim that means that they have
 6 standing to seek broad discovery into anything
 7 Apple has ever done. That is not what the
 8 caselaw says. The caselaw is clear that they
 9 have to state -- they have to plausibly allege
 10 claims in order to have standing to bring those
 11 claims.

12 THE COURT: Let me just ask that
 13 because this is always tricky for us. So they
 14 have a count that says attempted
 10:48AM 15 monopolization, and they alleged a lot of
 16 conduct in there. And I heard them say -- I'm
 17 thinking out loud here, just so you know -- I
 18 heard them say as long as we allege one type of
 19 anticompetitive conduct, we could move forward
 10:48AM 20 with the claim. You would agree if that was
 21 right, they could move forward with the claim.
 22 You're just saying they can't move forward with
 23 discovery about other types of anticompetitive
 24 conduct and conduct that independently states
 10:49AM 25 the antitrust claim?

1 claims about unilateral refusals to deal would
 2 be -- would have to go to discovery and would
 3 be the subject of litigation and *Trinko* and
 4 other case law explains why that shouldn't be.
 10:50AM 5 This is unilateral conduct we're talking about,
 6 and as you recognize in *Simon* and other cases,
 7 there's a chilling effect if we allow claims
 8 that don't have a plausible antitrust theory to
 9 go forward because they happen to be thrown it.
 10 And it encourages plaintiffs to throw in
 11 everything they think of no matter how
 12 plausible so that they can impose incredible
 13 discovery allegations on the defendant.

14 THE COURT: Understood. And again,
 10:50AM 15 I'm thinking out loud here. I think what's
 16 challenging for the Court in this particular
 17 case given these particular parties and their
 18 history of litigation against each other,
 19 arguments about burdens of discovery are maybe
 10:51AM 20 taken with a degree of skepticism, and I
 21 don't -- but I get it. I get what you're
 22 saying.

23 MS. MILICI: If I could just respond
 24 to that point because I think we've been
 10:51AM 25 engaging in discovery. They served discovery

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1 MS. MILICI: I think there's
 2 authority dealing with this both ways. From
 3 the District of Delaware, there's the *Thompson*
Reuters case where the court -- there was one
 4 Section 2 claim with two different forms of
 5 conduct and the court dismissed the Section
 6 2 claim based on one kind of conduct. And it's
 7 clear when you read the counterclaims, they're
 8 saying each of these are independent claims. I
 9 as well as collective claims, so I think they
 10 should be viewed individually.

12 There's a decision from Judge Boseberg in
 13 DC in the Section 2 claim where he said this
 14 theory is not viable because it's part of a
 10:49AM 15 single claim. I'm not going to dismiss the
 16 claim, but you're not going to get discovery on
 17 the non-viable theory because that would be an
 18 absurd result. That would mean every time
 19 somebody has one theory and they have one
 10:49AM 20 exclusionary contract theory that means that
 21 they can just say anything and get discovery on
 22 it, and that's just not the law. And I would
 23 point the Court to cases like *New York v.*
Facebook which really lays out why this is and
 10:50AM 25 explains that, basically, otherwise nonviable

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1 requests. Some of the requests are asking for
 2 things like, basically, every app store review
 3 that Apple has ever done based on the thinnest
 4 of allegations. That hasn't been the subject
 10:51AM 5 of discovery in any litigation between the
 6 parties. That's brand new litigation, brand
 7 new discovery and not suggested by any of the
 8 allegations in the complaint.

9 I will also say that counsel got up here
 10:51AM 10 and talked about this supposed theory they
 11 steal trade secrets. That's being litigated in
 12 the Central District of California. That
 13 cannot be relitigated here. The Central
 14 District of California case, when it has a
 10:51AM 15 decision, it will be res adjudicata. It's not
 16 an antitrust injury anyway, but certainly they
 17 don't get a second bite of the apple. Judgment
 18 as a matter of law was granted against them in
 19 some of the claims by Judge Tilghman, and
 10:52AM 20 jurors voted six to one among them on the
 21 others until a mistrial was declared. Those
 22 issues are going to be decided there. They're
 23 not antitrust issues to begin with, but they
 24 certainly don't get to come here and repackage
 10:52AM 25 then them as antitrust violations and get a

1 different result than they got the first time.

2 THE COURT: I understand.

3 MS. MILICI: Just to make a couple
4 arguments on that. I was surprised to hear
10:52AM 5 Apple stand here and talk about how Apple
6 prevented them from releasing an app. Those
7 apps are available. It's not true that Apple
8 prevented them from releasing them. It's not
9 true that they gave Apple any confidential
10 information. So they'll ask for allegations
11 that when you look at what they wrote down,
12 don't make any sense, and they have not
13 provided -- they have not identified any
14 unlawful conduct.

10:53AM 15 THE COURT: Maybe one way to address
16 that concern that you have -- and I'm not
17 making any rulings today, so don't feel like
18 you need to jump up. But that I say, okay, to
19 the extent there are some disputes about
10:53AM 20 discovery where they want every App Store
21 review -- I'm going to handle discovery for
22 this case -- you come back to me, and I say,
23 look, that's not going to happen or I say,
24 look, you've already got a bunch of discovery.

10:53AM 25 If you think that the trade secret

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1 misappropriation stuff is relevant, maybe it
2 is, and maybe it isn't, but you've already got
3 the discovery. Do you understand what I'm
4 saying? Could we deal with some of that that
5 way?

6 MS. MILICI: Your Honor, they haven't
7 satisfied *Twombly* on the App Store allegations,
8 and the entire point of *Twombly* is that you
9 shouldn't go forward with antitrust discovery
10 unless you can meet the pleading requirements,
11 and for these App Store allegations, as Your
12 Honor said in *Simon and Simon*, companies have
13 the ability to choose who they will deal with
14 and on what terms, and they have not alleged
10:54AM 15 anything, any unlawful conduct -- first of all,
16 they did claim that as to the scheme -- on page
17 nine of their brief, they say they're not
18 bringing that claim, and they have not
19 identified any unlawful conduct. They don't
10:54AM 20 cite a single case saying that a company can't
21 ask for information from people who it deals
22 with. I think they have to meet the pleading
23 requirements of this claim before they can seek
24 discovery. I think that's a fundamental
10:54AM 25 principle.

1 THE COURT: Okay. I understand your
2 point. Thank you.

3 MS. MILICI: And just -- I didn't
4 hear them anywhere say anything about proximate
10:54AM 5 cause for -- on these advertisements. Like, at
6 the end of the day, there is no link between
7 the advertisements that they say are false and
8 any harm to them, and that's the point that we
9 were making, Your Honor.

10:54AM 10 THE COURT: All right. Thank you.

11 MS. LIMBECK: Your Honor, if I could
12 address a couple of the points they made on
13 inequitable conduct.

14 They made this argument that Mr. Meyers
10:55AM 15 was substantively involved in the prosecution
16 of the applications because he was listed among
17 50 or 100 attorneys under Apple's customer
18 number for those applications. But first of
19 all, that is not anywhere in their pleading.

10:55AM 20 They did not actually allege that he's listed
21 on the customer number or has power of
22 attorney.

23 Second of all, even if they had alleged
24 that, that is not enough to show substantive
10:55AM 25 involvement. This district -- we cited a case

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1 from Judge Andrews where he dismissed
2 inequitable conduct allegations for two
3 attorneys for failure to disclose, failure to
4 show duty of disclosure because they were just
10:55AM 5 listed as power of attorney with five other
6 attorneys and they weren't substantively
7 involved in the prosecution.

8 And the Federal Circuit told us what
9 "substantive involvement" means. It means
10:56AM 10 involvement with the content of the
11 applications, and they have not alleged that
12 Mr. Meyers had any involvement with these
13 particular applications at all.

14 And the other thing they say is, well,
10:56AM 15 Mr. Meyers and others at Apple generally hire
16 multiple law firms. Again, that does not show
17 that Mr. Meyers himself specifically was
18 substantively involved in any of the
19 applications. It shows the opposite. Outside
10:56AM 20 counsel prosecuted these applications, not
21 Mr. Meyers, the chief of IP at Apple.

22 And then with respect to their other
23 points, they keep saying we've made these
24 allegations and you should take them as true.
10:56AM 25 But that does not meet the heightened pleading

1 standard for inequitable conduct. They
 2 actually need to plead particular facts that
 3 identify a specific individual and particular
 4 facts from which you can reasonably infer that
 5 that particular individual had knowledge of
 6 specific references that were withheld, and
 7 they have not done that here for Mr. Meyers,
 8 and they haven't done it for all 21 of the
 9 design inventors.

10 In fact, they admit the only allegation
 11 they have against the design inventors is that
 12 they were involved in development. If that
 13 were enough for inequitable conduct, every
 14 single defendant that pleads invalidity could
 15 also plead on information and belief the
 16 inventors must have known the patent was
 17 invalid for this reason or that reason;
 18 therefore, we have an inequitable conduct claim
 19 against the inventors. That would eviscerate
 20 the heightened pleading standard, and Your
 21 Honor should not allow that sort of an argument
 22 here.

23 So they can move forward with their
 24 invalidity arguments. We disagree with them,
 25 obviously, but they cannot just rely on their

1 conduct as a whole, which will be developed at
 2 that time.

3 And third, Apple mentioned that it
 4 approved our health app, but that was after we
 5 filed a lawsuit, and we mentioned and show in
 6 our complaint a repeated pattern, and certainly
 7 the fact the Apple eventually allowed the app
 8 doesn't undo the harm at the critical moment of
 9 our launch, and certainly doesn't undo the harm
 10 to competition as a whole.

11 THE COURT: Just to make sure I
 12 understand, sorry, there was a delay in Apple
 13 approving on the App Store, but the app is
 14 approved now?

15 MR. LARSON: The app is approved now,
 16 but the only thing I would say in our complaint
 17 is not just that there was a delay or they
 18 refused to approve it, it's a pattern we see
 19 where they're seeking confidential information
 20 from it, and they use Section 9.3 of the
 21 agreement that we discussed in our complaint,
 22 which says they can use whatever confidential
 23 information they get for whatever purpose. And
 24 you see a pattern of trying to get the
 25 confidential information. They're directly

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1 own invalidity contentions to then argue that
 2 someone specific actually committed some sort
 3 of misconduct that would rise to the heightened
 4 pleading standard for inequitable conduct here.

5 THE COURT: All right. Thank you
 6 very much.

7 If you feel like you need to respond, you
 8 can because we did give them some extra time,
 9 but there's no requirement.

10 MR. LARSON: First of all, I really
 11 disagree with how you characterize our
 12 discovery. We didn't serve any requests
 13 remotely like that that I recall. And as Your
 14 Honor pointed out, that can be handled on
 15 discovery to the extent the requests are too
 16 broad.

17 Second, on particular theories of
 18 antitrust, I don't think this is a good forum
 19 to decide the economics of our theories because
 20 Apple primarily argues bright-line rules. We
 21 argued about the bright-line rules. We think
 22 to the extent particular theories are going to
 23 be addressed, they should be addressed with
 24 expert testimony on the economics, if anything
 25 in summary judgment, and you should look at the

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1 competing with the Health Watch product.

2 THE COURT: I understand we're going
 3 outside the pleadings now, but I'm trying to
 4 understand what's going on here. You didn't
 5 give them the confidential information?

6 MR. LARSON: We did. We resisted
 7 giving them confidential information.

8 THE COURT: They had it from the
 9 other case; right?

10 MR. LARSON: Depending on what
 11 confidential information -- we were very
 12 careful about making sure Apple itself did not
 13 have it. And like I said, this is not just us.
 14 It's also Alive Core. In that case, Alive

15 Core -- Apple was not allowed at all, so
 16 there's a pattern here. We think, certainly,
 17 it's a part of the overall scheme and part of
 18 the overall conduct that we think would be
 19 relevant here in providing analysis of.

20 THE COURT: You all reminded me that
 21 I've written a lot about antitrust cases, but
 22 I'm still newer to this than I know a lot of
 23 you are. Because this is an attempted
 24 monopolization claim, is it relevant to intent
 25 even though it didn't cause any harm?

1 MR. LARSON: First of all, it would
 2 be relevant to intent, absolutely. Intent is
 3 also shown by conduct in antitrust cases, but
 4 certainly actual intent, evidence taken during
 11:01AM 5 discovery, the actions they engaged in to try
 6 to block us would absolutely be relevant.

7 To clarify, we are also asserting
 8 monopolization. Both monopolization and
 9 alternative attempt at monopolization, the
 11:01AM 10 theory being that even if they don't have
 11 market share now for us to assert that they're
 12 trying to maintain or bolster the monopoly
 13 power, the conduct is such that there's a
 14 dangerous probability that if the scheme were
 11:01AM 15 successful, they would attain that monopoly
 16 power, that market share.

17 THE COURT: Right. But for the
 18 Walker process, that can only be attempted.

19 MR. LARSON: In the *Garden* case it
 11:01AM 20 was both monopolization and attempted
 21 monopolization. And in *TransWeb*, it was
 22 attempted monopolization, which may be what
 23 Your Honor is thinking of. And certainly the
 24 theory the harm that will result if the scheme
 11:01AM 25 is successful is particularly powerful in the

1 attempt -- as to the attempted claim, but we
 2 think it's equally applicable to a
 3 monopolization claim because really the
 4 difference is for attempt, you're looking at
 11:02AM 5 the dangerous probability the scheme will
 6 result in obtaining monopoly power. For
 7 monopolization, you're pointing to the same
 8 conduct but the theory is the conduct will help
 9 maintain the monopoly power as opposed to lose
 11:02AM 10 it or bolster it. They're pled in the
 11 alternative.

12 THE COURT: Monopoly maintenance.
 13 Thank you.

14 So we went a little longer today than we
 11:02AM 15 allotted, but that's okay because I always
 16 enjoy hearing from my learned friends in the
 17 antitrust bar, so here's what I'll say. We
 18 took a lot of time before the hearing today to
 19 try to be prepared for today's hearing, and we
 11:02AM 20 heard the argument today. We're going to go
 21 back and look at some of the cases that you all
 22 referred us to, but I do want to get you an
 23 answer on this, both because it's fresh in my
 24 mind and I also know that discovery is ongoing
 11:03AM 25 and on a short schedule. I'm just not going to

1 be ready to do that for you today, and Monday
 2 is a new federal holiday.

3 So what I'd like to do is have you back
 4 on the phone for me on Tuesday, and that way I
 11:03AM 5 can just read my report and recommendation, and
 6 we'll have the court reporter take it down to
 7 make a record of it. So we'll put on order on
 8 the docket today. I think we'll try to do it
 9 probably mid to late morning, but we'll just
 11:03AM 10 give you the court's dial-in number. If we
 11 could have one attorney for each side to dial
 12 in to receive the ruling, that would be
 13 sufficient.

14 I think that concludes everything. I
 11:03AM 15 know we've got a couple outstanding matters
 16 that have come in on the docket with respect to
 17 the discovery or protective order dispute or
 18 stipulation. We'll get to that as soon as we
 19 can. As you all, I'm sure, are aware, it's a
 11:04AM 20 constant barrage that comes in, so we try to
 21 triage as much as we can.

22 All right. We'll be in recess. Thank
 23 you.

1 C E R T I F I C A T E

2 STATE OF DELAWARE)
) ss:
 3 COUNTY OF NEW CASTLE)

4 I, Deanna L. Warner, a Certified
 5 Shorthand Reporter, do hereby certify that as
 6 such Certified Shorthand Reporter, I was
 7 present at and reported in Stenotype shorthand
 8 the above and foregoing proceedings in Case
 9 Number 22-CV-1377-MN-JLH, *APPLE INC. Vs. MASIMO*
 10 *CORP., et al.*, heard on June 15, 2023.

11 I further certify that a transcript of
 12 my shorthand notes was typed and that the
 13 foregoing transcript, consisting of 56
 14 typewritten pages, is a true copy of said
 15 MOTION HEARING.

16 SIGNED, OFFICIALLY SEALED, and FILED
 17 with the Clerk of the District Court, NEW
 18 CASTLE County, Delaware, this 16th day of June,
 19 2023.

Deanna L. Warner, CSR, #1687
 Speedbudget Enterprises, LLC

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